Supreme Court, U. S.
FILED
OCT 1 1998
CLERK

No. 98-397 and 98-399

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

TROY BURRIS, in his official capacity as chairperson of the Arkansas Ethics Commission and JACK KEARNEY, TOM ALEXANDER, RITA LOONEY, and BEN ALLEN, in their official capacities as members of the Arkansas Ethics Commission ..... *Petitioners*

and CITIZENS FOR CLEAN GOVERNMENT ..... *Intervenor*

vs.

RON RUSSELL, KENT INGRAM, WILLIAM R. AUSTIN, and ASSOCIATED INDUSTRIES OF ARKANSAS POLITICAL ACTION COMMITTEE ..... *Respondents*

CITIZENS FOR CLEAN GOVERNMENT ..... *Petitioner,*

vs.

RON RUSSELL, KENT INGRAM, WILLIAM R. AUSTIN, and ASSOCIATED INDUSTRIES OF ARKANSAS POLITICAL ACTION COMMITTEE

–and–

TROY BURRIS, in his official capacity as chairperson of the Arkansas Ethics Commission and JACK KEARNEY, TOM ALEXANDER, RITA LOONEY, and BEN ALLEN, in their official capacities as members of the Arkansas Ethics Commission, ... *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

WHETHER ARKANSAS' $100 AND $300 PER ELECTION PER CANDIDATE CONTRIBUTION LIMITS TO CANDIDATES, ITS $200 ANNUAL CONTRIBUTION LIMIT TO APPROVED POLITICAL ACTION COMMITTEES, AND ITS $2,500 PER CANDIDATE PER ELECTION CONTRIBUTION LIMIT FROM SMALL DONOR POLITICAL ACTION COMMITTEES TO CANDIDATES VIOLATE THE FIRST AMENDMENT OR THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

LIST OF PARTIES TO THE PROCEEDING

The parties to this case are as follows: The Respondents are Ron Russell, Kent Ingram, William R. Austin, and Associated Industries of Arkansas Political Action Committee. The Petitioners in Case No. 98-399 are Troy Burris, Chairman of the Arkansas Ethics Commission, Rita Looney, Tom Alexander, Ben Allen, and Jack Kearney, Arkansas Ethics Commissioners, and the Petitioner in Case No. 98-397 is Citizens For Clean Government.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The Chairman and Members of the Arkansas Ethics Commission (hereinafter referred to as the State) and Citizens for Clean Government, Intervenor below, (hereinafter referred to as Citizens) have separately filed Petitions for a Writ of Certiorari in this Court. Since both petitions arise out of the same case and both petitions make similar arguments, Respondents will respond to both petitions in this pleading.

As required by Rule 15, Respondents call to the Court's attention that the Statement of the Case presented by Citizens incorrectly treats this as a public subsidy case and states that there is public funding that could reach $50 million annually in Arkansas caused by a $50 per individual income tax credit ($100 for joint filers) authorized by Act I. The tax credit is not public funding as it only provides a tax credit for state income taxpayers who contribute to political candidates, parties, and Political Action Committees. Arkansas law does not provide for payment of any funds by the government to any candidate. Furthermore, there is no evidence in the record of the number of taxpayers affected or the amount they would claim as a credit. Other factual and legal distinctions will be discussed in the argument portion of this Response.

For purposes of this response, Respondents accept the Statement of the Case presented by the State, except when it infers that the tax credit is a "public subsidy."

ARGUMENT

THERE ARE NO COMPELLING REASONS TO GRANT THE WRIT.

Respondents contend there are no compelling reasons for this Court to exercise its judicial discretion to grant the writ. First, there is no conflict among the circuits or decisions of this Court as every case cited, including this case, followed *Buckley v. Valeo*, 424. U.S. 1 (1976). Secondly, the Eighth Circuit did not decide an important federal question in a way to conflict with a state court of last resort, and, thirdly, the Eighth Circuit has not departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court. Finally, the Eighth Circuit has not decided an important question of federal law that has not been settled by this Court. *Buckley, supra*, only twenty-two years old, settled all questions raised by Petitioners.

This case was correctly decided by the Eighth Circuit after applying the principles of *Buckley, supra*, to the facts presented during a seven-day trial. The petitioners simply do not like the results of this factual review.

A. THIS IS NOT A CASE INVOLVING PUBLIC FUNDING OF CAMPAIGNS

Respondents make three initial observations about statements in the Petitions which leave the wrong impression of what this case is about. First, Citizens attempt to make this a public subsidy case. In their Petition the term "generous public campaign subsidy" is used. This is not a public subsidy case. A public subsidy is a direct payment from the government to the candidate or his campaign of governmental funds. Usually a public subsidy is associated

with something in return from the candidate or campaign, i.e., spending limits, contribution limits, or other restrictions on the candidate or his campaign, with an added provision that the candidate can opt out of the program. There are no such provisions in Arkansas law.

Here the "generous public subsidy" is a tax credit of up to $50.00 to an individual or $100.00 to joint filers. This tax credit only benefits the contributor who makes a political contribution. No public funds go to a candidate or his or her campaign. Indeed, even if one assumed for the sake of argument that the tax credit was a form of an indirect public subsidy, an individual candidate may never receive any benefit from the "indirect public subsidy" because the candidate may not receive a contribution from a taxpayer, or the taxpayer may have already given contributions in excess of his tax credit.[1] In addition, the candidate has to compete with political parties and political action committees for contributions as well as other candidates. In Arkansas there will be 5,926 offices filled in 1998. Many of the candidates had opponents in the party primaries, and many will have general election opponents. The irony of the tax credit is that it does not include any benefit for low to moderate income individuals in Arkansas who do not pay Arkansas income taxes.

In addition to incorrectly referring to the tax credit as a "generous or huge public subsidy," Citizens leaves the impression that more than one million taxpayers may contribute $50 million into political speech by making contributions. There is no evidence of any benefit from the

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[1]Since Arkansas has elections for many offices every two years, many candidates and officeholders will be encouraged to have a perpetual fund-raising effort in order to allow contributors to utilize their off election year tax credit.

tax credit, and any number advanced is pure speculation.[2]

The third observation is that Act I was advanced as an attempt to meld campaign subsidies and contribution limits into "an innovative, integrated system of campaign finance regulation that both prevents corruption and enhances political equality, while emphasizing the importance of individual participation." (Citizens Petition, p. 5) In fact, the campaign for Act I emphasized leveling the playing field by (1) ending corruption by "big" money by limiting contributions to $300 and $100, (2) increasing participation in the political system by creating the tax credit and Small Donor PACs, and (3) bringing more sunshine by adding lower disclosure provisions. The proponents emphasized that their concern was that winners raise more money than losers, incumbents raise more than challengers, and incumbents receive more contributions from special (business) interests, which they argue gives the appearance of corruption.

The Eighth Circuit held that Act I provided a subsidy and limitation scheme of sorts, but not the type approved in *Buckley*. *Buckley* approved the presidential campaign finance system that disallows contributions to the candidate after nomination in return for receipt of a set amount of dollars from the federal government for the general election.[3] The Eighth Circuit is correct.

Both petitions incorrectly state that the Eighth Circuit created a new standard of proof that imposes "an impossibly

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[2] The tax credit in Arkansas is not like the tax refund in Minnesota that was testified to at trial as the Minnesota tax refund program allows the contributor to receive a refund from general revenue, even if he does not have an income tax liability.

[3] That amount, $20 million in 1976, gave each of the major party candidates the same amount to spend on the general election campaign. The amount is adjusted annually for inflation.

stringent burden of justification of Arkansas' decision to adopt a $300 contribution ceiling in most statewide races and a $100 cap in other races" by requiring proof that contributions marginally in excess of $300/$100 had functioned as bribes, causing public officials to alter their official behavior. The Eighth Circuit simply held that the evidence offered to justify the low limits was insufficient. The Eighth Circuit held that a $1,000 campaign contribution, in itself, does not have an appearance of corruption, that $1,000 is not a large contribution as defined by *Buckley, supra*, that the limits were not narrowly tailored, and that the $300/$100 limits were a difference in kind from the limits allowed in *Buckley*.

In discussing the evidence, the Eighth Circuit pointed out types of evidence that might lead to a perception of undue influence or the appearance of corruption. A change of position following a large contribution or an effort to secrete a large contribution might give rise to the appearance of corruption spawned by a large contribution. However, here there was no individual contribution over three election cycles in excess of the $1,000 limit, no evidence proving that the official actions of any official was affected by a political contribution, and no evidence that any effort was made to conceal any contribution.[4] The Eighth Circuit is correct in its analysis because *Buckley* states that the compelling state interest is "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of *large* financial contributions on *candidates' positions and on their actions if elected to office*." (emphasis added) Only when this test is met may limits be enacted, and they must be narrowly tailored to address the harm.

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[4]Arkansas law, prior to Act 1, required any contribution or aggregate of contributions from any person of over $100 to be disclosed.

Act I was not intended to be comprehensive campaign finance reform. It did not address soft money. It did address independent expenditures by committees formed to support or oppose a clearly identified candidate by limiting contributions to $500 annually to the committee,[5] but not other independent expenditures. It did not address true public financing of campaigns in return for spending limits. Act I was intended to limit the First Amendment rights of some in order to enhance the position of others.

B. THE EIGHTH CIRCUIT FOLLOWED THE STANDARDS ANNOUNCED IN BUCKLEY V. VALEO AND CALIFORNIA MEDICAL ASSOCIATION V. FEDERAL ELECTION COMMISSION (CAL-MED)

An analysis of the Eighth Circuit's opinion demonstrates that it addressed the issues raised in the Petitions and correctly rejected them.

(a) Strict scrutiny is the proper standard

In its analysis, the Eighth Circuit first determined that the appropriate standard for review of the Government's attempts to limit campaign contributions is strict scrutiny. The Eighth Circuit rejected the argument that a more lenient standard of review was required because the Act included not only contribution limits but also a "public subsidy" scheme. The "public subsidy" scheme is not a subsidy

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[5]Although Respondents were found to lack standing to attack this provision, another case decided on the same day where standing exists challenges that provision. *Arkansas Right to Life State Political Action Committee v. Butler*, Case No. 98-1215 and 1218 (8th Cir., June 4, 1998). The Eighth Circuit affirmed the finding that the $300 contribution limit was unconstitutional and remanded the other issues that had not been decided to the District Court. No Petition for Writ of Certiorari was filed from the Eighth Circuit decision.

at all, as it does not provide for the transfer of any money to any candidate, but is in reality a tax credit against Arkansas State Income Tax. The tax credit is designed to encourage contributions to political candidates, PACs or political parties by more people. Tax credits and deductions are not a new idea. At one time Arkansas allowed a tax deduction for certain political contributions. The Eighth Circuit pointed out that the Court had approved a voluntary campaign subsidy and limitation scheme in Minnesota because that scheme presented candidates with an additional optional campaign funding choice with participation being voluntary. *Rosentiel v. Rodriguez*, 101 F.3rd 1544, 1552 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 1820, 1337 L.Ed.2nd 1028 (1997). The Court distinguished the schemes upheld in *Buckley* and *Rosentiel* from the Act I scheme because Act I was imposed upon all candidates and no candidate had the power to opt out. They declined to apply a standard of scrutiny to this case different from the one adopted in *Carver v. Nixon*, 72 F.3d 633, 636 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033, 116 S.Ct. 2579, 135 L.Ed.2d 1094 (1996), *Buckley v. Valeo, supra*.

The Court also held that what Petitioners tried to identify in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 117 S.Ct. 1364, 1370, 137 L.Ed.2d 589 (1997) as a weighing test, rather than strict scrutiny, was no more than a restatement or reformulation, not a modification, of the Supreme Court's familiar strict scrutiny analysis and rejected the argument that imposed a lesser burden than exacting review and pointed out that *Timmons* reiterated that strict scrutiny applies.

(b) The compelling state interest identified is correct

The Eighth Circuit next quoted *Buckley, supra*, in identifying the compelling State interest as "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial con-

tributions on candidates' positions and on their actions if elected to office." *Buckley*, 424 U.S. at 25. See also, *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 296-97, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981), *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480, 496-97, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985). Applying this standard to the facts before it, the Court first found that there had been no "credible evidence of actual undue influence or corruption stemming from large contributions." *Russell v. Burris, supra* (State App. A-11). The Court made an independent examination of the whole record and specifically found, "that $1,000 is simply not a large enough sum of money to yield, of its own accord without further evidence, a reasonable perception of undue influence or corruption." *Russell v. Burris, supra* (State App. A-12, 13) In a strictly fact oriented discussion, the Court explained that the Petitioners, by pointing to the identity of the contributors and their subsequent interest in legislation, are not complaining about the size of the contributions, but who contributes. The Court concluded that there was insufficient evidence to establish a reasonable perception of undue influence or corruption spawned by large contributions. There was no contribution over the legal limit in Arkansas of $1,000 per election during the three election cycles examined.

(c) The Eighth Circuit's review of the evidence is correct

The Petitioners incorrectly argue that the Eighth Circuit required the Petitioners to prove that a candidate or office holder changed his position due to an intervening contribution or attempted to conceal his contribution or that there had been some exorbitantly large (in Arkansas illegal) contribution in order to meet the burden of a reasonable perception of undue influence or corruption caused by large contributions. In fact, what the Court found was that there was insufficient evidence to support a reasonable percep-

tion of undue influence or corruption. The Court suggested the type of evidence which may give a reasonable perception of undue influence or corruption that was not present in this case. The Court in no way attempted to establish any new standard. It simply pointed to the deficiencies in the evidence before it.

(d) Act I contributions are too low

The Eighth Circuit found that the candidate contribution limits in Act I are too low to allow meaningful participation in protected speech and association just as they found in *Carver v. Nixon*, 72 F.3rd at 641-42. The $1,000 contribution limit approved in *Buckley* has eroded approximately 60% of the value of the dollar since 1976. Therefore, a $1,000 contribution in 1976 is about the same as a $2,500 contribution in 1998. The limits prescribed by Act I, adjusted for inflation, are approximately 4% or 12% respectively of the limits upheld in *Buckley*. The Court, following its earlier reasoning in *Day v. Holohan*, 34 F.3d 1356 (8th Cir. 1994) *cert. denied*, 513 U.S. 1127 (1995), and *Carver v. Nixon, supra*, found that the limitations in Act I are a difference in kind from the limits upheld in *Buckley* and are unconstitutionally low.

(e) Act I contribution limits are not narrowly tailored

The Court held that even if there were a compelling state interest in preventing the perception of corruption or undue influence due to any of the various concerns identified by the Petitioners, Act I was not narrowly tailored to address those concerns. The Court found Act I to be both overinclusive and underinclusive by limiting the free speech of all who would contribute without addressing specific concerns identified.

It is axiomatic that since there were no large contributions in Arkansas (i.e., over $1,000) prior to Act I, there was no evidence of a harm to be corrected. Therefore, there

was no way to narrowly tailor contribution limits to address a harm. The harm identified by the Petitioners was the source of the contribution (business interests), not the amount of the contribution.

The Eighth Circuit specifically followed the Supreme Court decisions, and the Petitioners are in error in asserting that they departed from *Buckley* in their analysis.

(f) The Eighth Circuit correctly followed Cal-Med

Petitioners complain that the Eighth Circuit did not follow *Cal-Med* when it found unconstitutionally discriminatory the provision in Act I permitting a Small Donor Political Action Committee to give as much as $2,500 to a candidate in contrast to limiting an Approved PAC to $100 and $300 per election per candidate[6] and in its finding that a $200 annual contribution limit to an Approved PAC violates the First Amendment.

To the contrary, the Eighth Circuit specifically found that the Plaintiffs below met the requirements set forth in *Cal-Med*, that they are burdened to a greater extent by this provision than Small Donor PACs are, and rejected the argument that just because a Small Donor PAC raised money in contributions of $25 or less the discrimination was allowable. That argument focuses on the source of the funds given to a PAC rather than on the entity from which the candidate receives the funds. The Court recognized the possibility that a Small Donor PAC itself could seek to control a given candidate and that a $2,500 contribution would be even more likely to exacerbate this difficulty than a $1,000 contribution from other contributors. The Court stated, "If any contribution is likely to give rise to a reason-

[6]The Eighth Circuit's holding returns these limits to $1,000.

able perception of undue influence or corruption, it would be one from an entity permitted to contribute two-and-a-half times the amount that most others are allowed to contribute." This certainly supported the finding that the Small Donor PAC provision is not narrowly tailored to serve the compelling governmental interest of combating the reality or the perception of undue influence.

The analysis of the $200 annual contribution limit to an Approved PAC properly followed *Cal-Med.*[7] The Court reasoned that the limit was not narrowly tailored to serve a compelling state interest because the limit is so low as to be different in kind from the limit approved in *Buckley*. The limit is only 8% of the *Buckley* limit in 1998 dollars, and 5%, before adjustment for inflation, of the $5,000 limit approved in *Cal-Med* in 1981.

C. THE EIGHTH CIRCUIT PROPERLY REJECTED PETITIONERS' ASSERTION THAT ADDITIONAL COMPELLING STATE INTERESTS WERE IDENTIFIED SUFFICIENT TO LIMIT FIRST AMENDMENT RIGHTS

Finally, we get to the heart and soul of the Petitioners' argument, i.e., *Buckley* should be revisited in order to identify another compelling interest justifying infringement of First Amendment rights, i.e., leveling the playing field.

Act I was not campaign finance reform, narrowly tailored to correct a problem and address a compelling state interest. It was an attempt to change the electoral process by taking away First and Fourteenth Amendment rights of some citi-

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[7] The $200 limit was part of a 1990 Initiated Act, which also lowered the contribution limit for candidates from $1,500 as enacted by the legislature to $1,000.

zens in order to grant large membership groups enhanced rights with the goal of leveling the playing field. *Buckley, supra*, rejects leveling the playing field as a compelling state interest. Petitioners ask this Court to change its prior rulings as to the sanctity of the First and Fourteenth Amendments and declare that the mere possible future inclusion of people not presently involved in the electoral process overrides the rights of individuals presently involved in the electoral process. Petitioners request that this Court establish this to be a compelling state interest. However, even if the Court recognized the possible inclusion of a greater portion of citizens in the electoral process to be a compelling state interest sufficient to allow curtailment of the rights of participation of other citizens, there was insufficient evidence at trial to establish that Act I would have that effect.

The contribution limit in Arkansas before Initiated Act I was $1,000. Act I gave Small Donor Political Action Committees the right to contribute $2,500 to a candidate. Act I reduced the $1,000 limit on all other persons or PACs to $300 and $100. The purpose of the Act was patently to change the direction and grant a favored status to large membership groups at the cost of reducing others' First Amendment rights. In order for this Court to reverse the Eighth Circuit, this Court would have to greatly modify its position established in *Buckley*.

The "wealth primary" argument is equally deficient. There is no evidence in the record to support a finding that prior Arkansas contribution limits denied any person access to the ballot as either a candidate or voter. In fact, the evidence reflected that ACORN members had run successfully for office. Furthermore, the tax credit and authority to establish a Small Donor PAC were not challenged and are still the law. If those provisions enhance candidate and voter participation, the goal of the proponents will be met.

Petitioners have attempted to establish that a state of confusion exists as to the interpretation of *Buckley* by excerpting, out of context, certain quotations and findings from various cases involving First and Fourteenth Amendment rights. Each cited is readily distinguished from the case at hand. The only thread which runs constantly through all of these cases is an adherence to the principles set forth in *Buckley*. In none of the cases relied upon by the petitioners are the facts remotely similar to those in the case at hand.

Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990); *Colorado Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604 (1996); *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986); *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480 (1985); *First National Bank of Boston v. Belloti*, 435 U.S. 765 (1978) are all cases involving limits on campaign expenditures. There is no question involving expenditure limits in the case at hand.

Burdick v. Takushi, 504 U.S. 428 (1992) concerned a state ban on write-in votes.

CSC v. Letter Carriers, 413 U.S. 548 (1973) and *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995), were cases involving the First Amendment rights of government employees.

Timmons v. Twin Cities Area New Party, supra, was concerned with a state ban on fusion or unwanted association on the ballot.

Vannetta v. Keisling, 899 F.Supp. 488 (D. Ore. 1995) affirmed No 95-35998, 1988 WL 461920 (9th Cir. Aug. 11, 1998) struck down a state ban on out-of-state contributions.

California ProLife Council PAC v. Scully, 989 F.Supp. 1282 (E.D. Cal. 1998); and *Federal Election Commission v. National Conservative Political Action Committee, supra*, involved public finance of election campaigns.

In all cases cited involving contribution limits, either the limits were found to be unconstitutional or limits were approved which were in excess of the Arkansas $1,000 limit. *Buckley* when applicable, has been faithfully followed.

CONCLUSION

Act I was a misconceived idea based on the false assumption that there is something inherently wrong with meaningful participation by citizens in the political process by making campaign contributions to those they support. Political campaigns have become more expensive over the years, but there is still a need to get the message out. It takes money to get the message out and run a campaign. Drastic low contribution limits are a form of spending limits because many people do not make political contributions. Since 1976 *Buckley* has guided legislatures, citizens, and courts in their analysis of campaign finance reform. In the instant case,the *Buckley* principles were followed to the letter. Act I was found to violate the First and Fourteenth Amendment rights of the Respondents. In so finding, no new principles were established, just the ones identified in *Buckley*. There is no conflict between the circuits and no important issues that need to be addressed by this Court. Even if the Court was inclined to review a campaign finance case, this is not the right case. This case does not include many issues that would be part of a comprehensive campaign finance case and does not seek to go beyond the principles announced in *Buckley*.

None of the considerations governing review on certiorari identified in Rule 10 of the Rules of the Supreme

Court of the United States are present in this case.

For the reasons set forth in this Brief, the Respondents respectfully request that the Court deny both Petitions for Writs of Certiorari.

Respectfully submitted,

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